ILE COPY

SUPREME COURT, U.S.
FILED
AUG
JAMES R. BROWNING, Clerk

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1960

NO. 301

KEMP A. HARRISON,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WALLACE MILLER, JR.
Attorney At Law for Petitioner

Post Office Address:
515 Persons Building
Macon, Georgia

Of Counsel:
MILLER, MILLER & MILLER
515 Persons Building
Macon, Georgia

SUBJECT INDEX

	Page
Jurisdictional Statement	2
Questions Presented for Review	2-7
Statutes Involved	7, 21
Statement of the Case	7-9
Argument Amplifying Reasons for Allowance of Writ	9-18
Proof of Service	19
Appendix	21-29

CASES CITED

Brandow v. U. S., 268 F. (2d) 559	16
Christensen v. U. S., 90 F. (2d) 152	11
Eaton v. U. S., 133 F. (2d) 522	15
Ebeling v. U. S., 248 F. (2d) 429	10
Edington v. U. S., 164 U. S. 361, 17 S. Ct. 72, 41 L. Ed 467	14
Holmgren v. U. S., 217 U. S. 509	15
Hubbard v. U. S., 79 F. (2d) 850	14
Mattox v. U. S., 146 U. S. 140	15
Michaelson v. U. S., 335 U. S. 469, 93 L. Ed. 168	14
Morisette v. U. S., 342 U. S. 246, 96 L. Ed. 288, 72 S. Ct. 240	11, 13, 14
Remmer v. U. S., 348 U. S. 904, 99 L. Ed 710, 75 S. Ct. 288	15
U. S. v. Britton, 107 U S. 655	12, 13
U. S .v. Buckley, 49 F. Supp. 993	10
U. S. v. Gilliland, 312 U. S. 86, 85 L. Ed. 598	17
U. S. v. Grossman, 154 F. Supp. 813	17
U. S. v. Johnson, Ohio 1879 (4 Cir.) Law Bul. 36 Fed. Cas. No. 15483	3, 12
U. S. v. Levin, 133 F. Supp. 88	17
U. S. v. White, 69 F. Supp. 562	18
U. S. v. Wicoff, 187 F. (2d) 886	15
Wardlaw v. U. S., 203 F. (2d) 884	14

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1960

NO._____

KEMP A. HARRISON,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Kemp A. Harrison, petitioner in the above-styled case, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the above case, and respectfully shows to this Honorable Court as follows:

OPINION IN COURT BELOW

The opinion of the court below (R. 654) has not been officially reported, but is reproduced in the Appendix to this petition.

JURISDICTION OF THIS COURT

Jurisdiction of this Court is invoked under Section 1254 (1), Title 28, United States Code, the judgement for which review is sought being a judgement of conviction of petitioner in a criminal case sentencing him to a year and a day in the penitentiary and to pay a fine of $5,000.

DATE OF JUDGMENT SOUGHT TO BE REVIEWED

The judgment of the Court of Appeals for which review is sought is dated May 31, 1960. A motion for reheraing was filed in the Circuit Court of Appeals; and such motion was denied, without opinion, on July 13, 1960; a copy thereof appears in the Appendix hereof.

QUESTIONS PRESENTED FOR REVIEW

1.

The Court of Appeals, in sustaining the conviction of petitioner, decided "the element of specific intent is not an ingredient under the offense charged in Court III." Count III of the criminal indictment charged that petitioner, while a director of a state bank insured by the Federal Deposit Insurance Corporation, "did knowingly and wilfully falsify, conceal and cover up, by trick, scheme and device, and caused to be falsified, concealed and covered up by trick, scheme and device, material facts ... in a matter within the jurisdiction of an agency of the United States, to-wit, the Federal Deposit Insurance Corporation ... all in violation of 18 U SC 1001." (Section 1001 of Title 18 USC appears in the Appendix hereof.)

The question is whether intent is an ingredient under this criminal statute, before a conviction thereunder is authorized.

2.

The Court of Appeals, in sustaining the conviction and sentence of petitioner under Count IV of tthe indictment, with respect to the only other criminal statute that petitioner was found guilty of violating, Section 1005 of Title 18 USC (set forth in the appendix hereof), stated in its judgment:

"However, even a casual reading of this section makes plain that no specific intent to injure or defraud a bank is an ingredient in the offense charged in the first two paragraphs of Section 1005. Each of the first three paragraphs states a separate and distinct crime. Neither the first nor the second requires proof of any intent to injure or defraud the bank. The acts described in those two paragraphs are made criminal per se. We find very little case law on this subject. In fact, the only case found is U. S. v. Johnson, Ohio, 1879 (4 Cir.) Law Bul. 36 Fed. Cas. No. 15483."

Such count IV of the indictment charges that petitioner, while a director of the involved bank "did unlawfully, wrongfully, wilfully and fraudulently, without authority from the directors of said Citizens State Bank, make, draw, issue and put forth, and cause to be made, drawn and put forth, a bill of exchange (of the Citizens State Bank), with intent to defraud said bank and the depositors thereof; all in violation of 18 USC 1005."

This count charges a violation of the second paragarph of Section 1005, which the Court of Appeals states requires no specific intent to injure or defraud the bank or its depositors.

The question is whether it is essential to a valid conviction under an indictment charging the second paragraph in Section 1005 that there be charged and proved intent to injure or defraud the bank or the depositors thereof.

3.

The Circuit Court, in sustaining the conviction and sentence of petitioner to the penitentiary, held in its judgment with respect to a timely exception to the trial court's charge, "that it is presumed one intends the consequences of his act," and "it is the law that a person intends the usual and probable consequences of his act," as follows:

"Since, as we have stated above, the ingredient of specific intent to defraud is not a part of the offense charged, the trial court actually gave the defendant the benefit of a more favorable charge than was required, since the court charged the jury that it must find beyond

a reasonable doubt that this intent existed in order to convict. Since such finding was not necessary under the charge as defined in the statute, the court's statement as to the presumption arising when one performs certain acts would be entirely harmless. The element of specific intent is not an ingredient under the offense charged in Court III. It was, therefore, used by the court only in connection with the crime charged under Section 1005 . . .

"We think it appropriate to say that where a specific intent to defraud is a necessary ingredient in a crime, as it would be if this indictment had been brought under the third paragraph of Section 1005 (the making of a false entry 'with intent to injure or defraud such bank'), it would be improper for the court to charge such a presumption as that 'it is presumed that one intends the consequences of his act' if the language could fairly be construed to permit the jury to find a verdict of guilty merely upon proof of a false entry with no affirmative proof of an intent to defraud. This is so because it is not true that every making of a false entry in a bank's books is done with intent to defraud the bank. Such an entry may, while false, be entirely innocently made. The specific intent required by the statute cannot be presumed. Here, however, the question does not arise, for, as we have said, the issuing of tthe cashier's check of the bank authority of the directors is itself a crime regardless of any intent to injure or defraud the bank."

The Court of Appeals ruled, erroneously, that no element of intent is required under the offense chargd in Count III (Section 1001, Title 18 USC), and that intent is not an ingredient in the offense charged in Count IV (the second paragraph of Section 1005, Title 18 USC), but nevertheless holds that the charge of the trial court with respect to the presumption that on intends the consequences of his act applies to Count IV. This is an anomaly.

The question presented here is whether *either* of Counts III or IV (they being the only counts for which petitioner was found guilty) requires any specific intent to justify a conviction. If either count does, was it harmful error for the Trial Court to authorize the jury to infer

such intent simply on the presumptiton that one intends the consequences of his act.

4.

Did the Court of Appeals err in its judgement in not reversing the trial court upon the failure of the trial court to charge tthe jury a timely written request to charge on the defense of good character, evidence thereof being submitted at the trial, and timely exception being taken, as follows:

"Both of the defendants have produced to you evidence of their good character and reputation. I charge you that evidence of good character is a substantive defense. I have previously charged you that the defendants entered into the trial of this case with the presumpition of innocence in their favor. I have also charged you that if there is any reasonable doubt resting on your mind as to the guilt or innocence of the defendants, it would be your duty to resolve this doubt in favor of the defendants and acquit them. In connection with this, I charge you that evidence of good character of defendants in a case such as this may alone be sufficient, in and of itself and by itself, to generate and create a reasonable doubt of the guilt of the defendants, requiring their acquittal, although without such evidence of good character, the other evidence in the case might be convincing as to their guilt."

5.

Did the Court of Appeals err in failing to reverse the trial cout upon the trial court's judgment in overruling a motion for a mistrial based on the following circumstances which occurred during the trial of the case in the trial court:

Beginning on R. p. 202 is recorded a motion for a mistrial by the defendants, based substantially on the following facts:

After the jury had been stricken for the trial of the case, and two of the jurors were of the Negro race, one male, Eugene Scott, and one female, and the other eleven jurors (one being an alternate juror) were of the White race, and included one elderly white female, Mrs. Dunn (she not being the alternate juror), the jury box was being filled and was prac-

tically full, when the negro man, Eugene Scott, was about to sit in a vacant seat next to the white lady, Mrs. Dunn. At this point, the Hon. Frank O. Evans, United States Attorney, who participated during the trial of the case, representing the Government, walked from his position at counsel's table in the courtroom over to the jury box and directed the Negro man, Eugene Scott, to sit up on the back row, so that he would not be seated on the front row next to Mrs. Dunn. The motion recites that it appeared that Mrs. Dunn was pleased by that action of the District Attorney, and that "the open demonstration by the United States Attorney, the prosecuting attorney, before the jurors in a situation like that can have but one implication, namely, that the prosecution is by its action ingratiating itself with the jury, and we think quite improperly and highly improper."

"We think it highly improper, Your Honor, and for that reason we think Your Honor ought to declare a mistrial in this case, as we see no other proper motion that we can make."

It was pointed out in the motion that the Negro juror, Eugene Scott, was from Milledgeville, Georgia, the residence of such United States Attorney, and "I do not know whether Mr. Evans even knows Eugene Scott, but he is from Milledgeville and presumably he does. Nevertheless, the juror, Eugene Scott, has kept his back seat there in the same position that Mr. Evens told him to sit, the one he has always sat in since he first entered the box, rather than sitting by Mrs. Dunn whom he started to sit down by."

"We just think, Your Honor, that is the United States Marshal's place to make the arrangements for the jury to be seated and take the positions that are comfortable, socially, physically and otherwise; and it is not compatible with the processes of our courts, as we know them for the United States Attorney to be openly looking after the welfare of the jury. The tendency can be but one way and that is to ingratiate the jury with the prosecution, with the Government's side of the case."

Was the verdict and judgment contrary to the law and evidence and without evidence to support it?

STATUTES INVOLVED

The two Federal criminal statutes involved are Section 1001 and Section 1005 of Title 18 USC, set forth in the Appendix hereof.

STATEMENT OF THE CASE

The indictment charges petitioner and a co-defendant, Dreyfus Lee Fountain, in four counts; Count I being a charge of a conspiracy to violate Sections 656, 1001 and 1005 of Title 18 USC; Count II being a charge of violation of Section 656, Title 18 USC; Count III charges a violation of Section 1001, Title 18 USC; Count IV charges a violation of Section 1005, Title 18 USC. The trail Court, on motion, dismissed Count II, and the jury found both defendants guilty of Counts III and IV and not guilty of Count I.

Defendant Fountain was sentenced by the court to no penitentiary confinement, but to probatioon and a fine of $5,000. Petitioner, Kemp A. Harrison, was sentenced to a year and a day in the penitentiary and a fine of $5,000. Fountain elected to abide by the judgement of the court and made no appeal.

Fountain was the President and Director and controlling stockholder of the involved bank, with its deposits insured by the Federal Deposit Insurance Corporation.

Harrison was a Director of the Bank and Mayor of the City of Warner Robins, Georgia; he was also a licensed pharmacist; his job as Mayor was not a full-time job, and he operated a drug store, known as Victory Drug Store; also, he engaged in other business activities concerning the development of apartment houses, housing projects and shopping centers.

Under the Georgia law, Harrison could borrow from the bank $40,000, but the Directors of the bank had fixed a policy that no Director could borrow from the bank in excess of $20,000, direct borrowing, at any one time.

On January 14, 1958, Harrison owed the bank on loans, therefrom, $28,900, $2,000 of which was past due; thus, his loans were $8,900 over the policy limit of the bank, but within the legal limit.

At the first meeting of the Board of Directors in 1958, held on January 14, 1958, a motion was adopted "that directors, officers and employees and businesses they might be associated with, and their immediate families, not be allowed to overdraw their account, as this is a reflection on the bank. All to be given notice of this action and correction of such to be immediately taken"

Also, on the same day, defendant Harrison had an overdraft in his checking account with the bank in the amount of $7,200.

There were other Directors of the bank who were over the bank's policy on loans.

Harrison, on January 17, 1958, went to the bank and requested Fountain to lend to the City of Warner Robins, on a 90-day note, $20,000, such note to be signed in the name of the City of Warner Robins by Harrison, as Mayor. The note was executed, and a cashier's check of the bank was issued by Fountain in the amount of $19,700 (the amount of the note less $300 interest deducted in advance), payable to the City. Harrison endorsed the check in the name of the City by himself as Mayor, then and there, and had the amount of the check credited to his personal obligations to the bank. The bank's records reflected a loan to the City of Warner Robins in the amount of $20,000 and reflected corresponding credits to the accounts of Harrison. No false entry was placed on the books, and no money, funds or credits left the bank or were withdrawn from the bank.

No notes or other evidence of indebtedness of Harrison to the bank were cancelled or left the custody of the bank. Harrison's collateral for his indebtedness to the bank, in the amount of $60,000, remained with the bank.

Harrison was using the name and credit of the City of Warner Robins until he could rework some of his finances,loans and assets, in order to bring his obligations to the bank within the limit of the directive of the bank Directors of January 14.

On February 4, 1958, because of certain criticism brought to the knowledge of Harrison by some of the Councilmen of the City of Warner Robins, pertaining to his use of the credit and name of the City of Warner Robins, as aforesaid, Harrison caused the obligation appearing on the bank's books in the name of the City of Wanrer Robins to be removed by paying off such obligation.

A regular audit of the bank's books by the Georgia Banking Department occurred on April 10, 1958, and by a Federal Deposit Insurance Corporation examiner on June 17, 1958.

The basis of Federal jurisdiction in the court of the first instance is the indictment charging a violation of Federal criminal statutes, as aforesaid.

ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF WRIT

Question No. 1

Is an Element of Intent Required in the Offense Charged in Section 1001, Title 18 USC?

This Court has not directly passed on this quesiton, and the Circuit Court cites no authority for its judgment that "specific intent is not an ingredient under the offense charged in Count III."

The Eight Circuit Court of Appeal has ruled that intent is an essential ingredient of this offense:

> "A violation . . . . occurs where anyone wilfully makes or uses a false writing or document, knowing that it contains a false statement or entry and intending that it shall bear a relation or purpose as to

some material fact which is within the jurisdiction of a department or agency of the United States, and with the false statement it contains having a materiality on the department or agency matter."

Ebeling v. U S., 248 *F.* (*2d*) 429 (*8th Cir.*)
Certiorari denied December 16, 1957

Thus, there is a conflict of decisions on this question between the Fifth Circuit and the Eight Circuit Courts.

The District Court for the Southern District of New York has held point blank that intent is an essential ingredient, holding:

"The wrongful purpose is an essential element of offense of knowingly and wilfully falsifying or concealing a material fact, or making a flase representation in any matter within the jurisdiction of a department or agency of the United States. . . .

"Evidence of wrongful intent must be clear and convincing and may not be presumed in a criminal case."

U. S. v. Buckley, 49 *Fed Supp.* 993

Section 80 of Title 18 was the predecessor to Section 1001, Title 18 USC. Such Section 80 provided that "whoever, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and *with the intent of cheating or swindling* or defrauding the Government of the United States, or any department thereof. . . . shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme or device, a material fact . . . shall be fined . . . or imprisoned . . . or both." (Emphasis added.)

Section 1001 of Title 18, being the successor to that portion of Section 80 pertaining to concealing or covering up by trick, scheme or device, does not have in it the words "with the intent of cheating, etc."

It is respectfully submitted that the situation here, with respect to old Section 80 and present Section 1001, is the same as with respect to old Section 82, Title 18 USC, which is included in present Section 641, Title 18 USC. Old Section 82 was in the following language: "Whoever shall

take and carry away or take for his own use, or for the use of another, *with intent to steal or purloin*, any peresonal property of the United States . . . etc." (Emphasis added.) Whereas, new Section 641 states: "Whoever embezzles, steals, purlions or knowingly converts to his own use, or the use of another . . . or a thing of value . . . " It will be noted new Section 641 omits the language "with intent to steal or purloin."

This Court had this section under review and held:

> "We hold that mere omission from Section 641 of any manner of intent will not be construed as eliminating that element form the crimes denounced."

Morisette v. U. S. 342 *U. S.* 246, 263; 96 *L. Ed.* 288, 300

Under old Section 80, Title 18 USC, the Seventh Circuit held;

> "In prosecution for concealing by trick material fact for the purpose of defrauding Home Owners Loan Corporation, accused entitled to definition of crime charged and to specific instruction on criminal intention, since statute makes intention necessary element of offense."

Christensen v. U. S., 90 *F.* (2*d*) 152

Congress did not intend, in the enactment of Section 1001, to eliminate the question of intent; and, thus, the judgment of the Curcuit Court of Appeals for the Fifth Circuit in this case is erroneous.

Question No. 2

Is Intent to Injure or Defraud the Bank or Its Depositors an Eseential Ingredient of the Crime Set Forth in the Second Paragraph of Section 1005, Title 18 USC?

The effect of the decision of the Fifth Circult Court of Appeals is that an officer of a bank who *only makes* a note, acceptance, etc., and then tears it up and throws it in the waste basket, with no intent to injure or defraud, and with no criminal or evil intent whatsoever, can be sentenced to the penitenitary for five years and fined $5,000, simply because of the fact that he made such a note or acceptance, etc. of the bank;

whereas, before such an officer can be convicted and sentenced for making a false entry in the bank's books, he must make the false entry with intent to injure or defraud the bank. etc.

We submit that Congress never had any such intention as this.

The case of United States v. Johnson, decided in the year 1879 (4th Cir.), Law. Bul. 361 Fed. Cas. No. 15483, cited by the Curcuit Court in this case as authority for its judgment, is not sound law. That case holds that the intent to injure and defraud is not an element of the offense of misapplication of money. The Johnson case had under consideration Section 5209, Revised Statutes U.S., and that case, with respect to misapplication of money in the bank, is contrary to a multitude of cases, including a decision of this Court, namely, *U.S. v. Britton*, 107 U.S. 655, where it was held:

"Applying the rules thus laid down to the counts of the indictment, we are to consider whether they sufficiently state an offense, under Section 5209 of the Revised Statutes.

"To describe the offense charged in the first thirty-six counts of the indictment, Section 5209 requires the following averments: . . . .

(2) That being such president or other officer, he made in a book, report, or statement of the association, describing it, a false entry, describing it.

(3) That such false entry was made with intent to injure or defraud the association, or to deceive any agent, describing him, appointed to examine the affairs of the Association. . .

"We are, therefore, of the opinion that the wilful misapplication of the money and funds of banking association, which is made an offense by Section 5209, means something different from the acts of official official maladminstration, referred to in Section 5239, and it must be a wilful misapplication for the use or benefit of the party charged, or of some person or company other than the assocation, with the intent to injure and defraud tthe association or some other body corporate or some natural person.

"... But the count which avers such an act should also make other averments to show that the application was not merely a use of the money for the benefit of the association forbidden by law, but a criminal misapplication, by which it was possible that the association could be defrauded."

U. S. v. Britton, 107 *U. S.* 655, 662, 666.

Thus the Fifth Circuit Court of Appeals cites as authority for its judgment a case which is contrary to the above decision of this Court.

Here again, we respectfully submit that the reasoning by this Court in the of *Morisette v. U. S.*, 342 U. S. 246, 263, is applicable here, namely, that Congress certainly did not intend that the element of intent not be included in the crime charged in the second paragraph of Section 1005, Title 18 USC.

Question No. 3

Did the Circuit Court of Appeals Err in its Judgment that Neither of the Crimes Charged Involved any Evil or Criminal Intent, and that, Therefore, it was not Harmful Error for the Trial Court to Permit the Jury to Infer Criminal Intent Simply on the Legal Presumption Charged the Jury by the Court that One Intends the Consequences of his Acts?

As set forth hereinbefore, the Circuit Court was in error in holding that both of the crimes charged did not involve any intent. This being true, the necessary result is that the charge of the trial court on the presumption that one intends the consequences of his acts was harmful error, because the alleged offenses did not inherently require intent for their commission.

The Fifth Circuit, in its decision in this case, recognizes that if intent were an essential ingredient of the crimes involved, it was harmful error for the trial court to charge as it did.

Again, in the Morisette case this Court stated:

"We think presumptive intent has no place in this case. . . A presumption which would permit the jury to make an assumption

which all the evidence considered together does not logically establish would give to the proven facts an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumtion of innocence with which the law endows the accused, and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary."

Morisette v. U. S. supra.

The Fifth Circuit itself, in following the Morisette case, has stated:

"The intent involved in this offense is not inherent in the act itself (evasion of income taxes), but is a specific intent involving bad purpose and evil motive, and that specific intent must be proved or clearly inferred from the evidence."

Wardlaw v. U. S., 203 *F.* (2*d*) 884

The Ninth Circuit Court of Appeals has ruled:

"The intent to defraud cannot be presumed from an unlawful act which does not naturally bespeak fraud. . . . The color of the act detrmines the complexion of the intent only in those situations where common experience has found a reliable correlation between a particular act and a corresponding intent."

Hubbard v. U. S., 79 *F.* (2*d*) 850

Question No. 4

Did the Circuit Court Err in Affirming the Trial Court's Failure to Charge the Wirtten Request to Charge on the Defense of Good Character?

We respectfully submit that the Circuit Court's judgment is in conflict with he following decisions of his Court:

Edington v. U. S. 164 *U. S.* 361, 17 *Sup. Ct.* 72, 41 *L. Ed.* 467.

Michaelson v. U. S., 335 *U. S.* 469, 93 *L. Ed.* 168

Also, it is in conflict with the following decision of the Seventh Circuit:

U. S. v. Wicoff, 187 *F.* (2*d*) 886, 890

Question No. 5

Did the Circuit Court of Appeals Err in Failing to Reverse the Trial Court upon that Court's Judgment Overruling the Motion for a Mistrial?

It is respectfully submitted that under the following Supreme Court decisions and decision of the Eight Circuit, the conduct of the District Attorney was highly improper and prejudicial to petitioner, requiring a new trial:

Clyde Mattox v. U. S., 146 *U. S.* 140

Holmgren v. U. S., 217 *U. S.* 509

Remmer v. U. S., 344 *U. S.* 904, 99 *L. Ed.* 710 75 *S. Ct.* 288

Eaton v. U. S., 133 *F.* (2*d*) 522, 527 (*8th Cir.*)

"In a criminal case any private communication, contact, or tampering, directly or indirectly, with a juror during the trial about the matter pending before the jury, is for obvious reasons deemed presumptive prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court during the trial, with full knowledge of the parties."

Remmer v. U. S., 347 *U. S.* 227, 229, 98 *L. Ed.* 654, 656

It cannot be refuted that the District Attorney's actions were improper. Presumptively, such attorney's action was prejudicial to petitioner. There was no counter-showing by the Government that the ten white jurors on the jury were not pleased with the action taken by the Government's attorney; there was no counter-showing that the ten white jurors were not displeased at defendant's counsel for not taking the action that Government's counsel did; there was no counter-showing that such action of the District Attorney did not influence the jury in favor of the District Attorney; there was no counter-showing that such action of the District Attorney did not influence the jury in their deliberations and verdict.

Question No. 6

Was the Verdict and Judgment Contrary to the Law and Evidence and Without Evidence to Support It?

As heretofore set out, the Court of Appeals erred in ruling that intent is not an essential ingredient of the offense charged under Section 1001., Count III.

This Court has not passed upon this question nor, upon Section 1001 as it now exists, so far as we can ascertain.

All the cases that we can find upholding a conviction under Section 1001 are cases wherein tthe false statement or the covering up of a material fact involved some dealings with an official of an agency covered in the section or with an agency itself included in the section.

In the instant case, petitioner was not dealing with any agency or official of an agency included in Section 1001.

The effect of the Court of Appeal decision upholding the conviction in the instant case is that it is not necessary to a conviction under Section 1001 that a fales statement or a concealment or covering up of a material fact be in dealings with an agency or official thereof included in the section.

This ruling is in conflict with the following Circuit Court decision:

> "We believe that the conduct Congress intended to prevent by Section 1001 was the *willful submission to federal agencies* of false statements calculated to induce agency reliance or action, irrespective of whether actual favorable agency action was, for other reasons impossible." (Emphasis added)

Brandow v. U. S. 268 *F.* (2*d*) 559, 565 (9*th Cir.*)

Also, the Fifth Circuit Court of Appeals judgment is in conflict with the following district court judgments:

> "If the defendant simply made, or caused to be made, a false writing concerning a matter within the Veterans Administration's

jurisdiction, but immediately destroyed it before using same, it is highly unlikely that Congress meant that they should be punished. It is only when such false statement was made, or caused to be made, and thereafter caused to be used with the Veterans Administrasion that a criminal offense occurs." (Emphasis added.)

U. S. v. Grossman, 154 *F. Supp.* 813, 818

"In United States v. Gilliland, 312 U. S. 86, 61 S. Ct, 518, 522, 85 L. Ed. 598. . . the Court. . ..seemed to be particuarly careful to limit the statute to the false or fraudulent use of documents or affidavints." (Emphasis added)

U. S. v. Levin, 133 *F. Supp.* 88

The only Supreme Court case that we can find that throws any light at all on this matter is the case of *U. S. v. Gilliland*, 312 *U.S.* 86, 85 *L. Ed.* 598, and that case involved 18 USC, Section 80, the predecessor of Section 1001. The Supreme Court in that case held that Section 80 was broad enough to include cases which do not involve any actual or attempted monetary loss, but, as pointed out in the following district court case, the Gililand case involved some dealings directly with an official of an agency in the section.

"United States v. Gilliland, 312 U. S. 86. . . is the only Supreme Court case which involved a construction of the 1934 amendment to Section 80, Title 18 USCA. Under the ruling in that case the 1934 amendment was held to be broad anough to include matters which did not involve any actual or attempted monetary loss to the Government.

"But in that case as in all of the other cases where that same construction of the Act has been followed, it is noted that the statement was made directly to an official of the Government charged with the responsibility of administering or enforcing the particular law involved. . .

"That points up the proposition that the deception which was condemned by the statute—and deception is what the statute condemns—must be practiced upon the particular department or agency involved.

(Then the district court goes on to cite the absurdities that would result were the law construed other than that the deception must be practiced upon the particular agency involved, giving its last example as follows:)

". . . You can get it down to where if one lied to a neighbor or friend about one's age,, or actual residence on a particular street, it would be a crime for making a false statement with a matter within the 'jurisdiction' of some department of the Government, because certain agencies of the Government are charged with enforcement of the Selective Training and Service Act and the age and residence of male persons are material facts in connection with the administration of that law. Examples can be multiplied."

U. S. v. White, 69 *F. Supp.* 562, 563, 564.

Now, with respect to the conivction under the second paragraph of Section 1005, Title 18 USC, if the Fifth Circuit Court was correct in its judgment that intent is not an ingredient under this offense, then no more may be said. However, it is respectfully submitted that intent is an essential element of such offense, and that the evidence was totally lacking in any proof that petitioner had any intent to injure or defraud the bank or its depositors or any other evil or unlawful intent.

It is respectfully submitted that this petition should be granted.

Post Office Address:
515 Persons Building
Macon, Georgia

Wallace Miller, Jr.
Attorney for Petitioner

Of Counsel:

Miller, Miller & Miller
515 Persons Building
Macon, Georgia

PROOF OF SERVICE

I, Wallace Miller, Jr., certify that I am the attorney of record for petitioner and I am a member of the Bar of the Supreme Court of the United States.

That on the 6 day of Aug, 1960, I served copies of the foregoing and attached petition for writ of certiorari, and appendix thereto attached, as follows:

(1) On the United States of America, respondent, by mailing by first-class air mail a copy tthereof in a properly addressed envelope, with sufficient postage affixed thereto, to the Solicitor General, Department of Justice, Washington 25, D. C.

(2) On the United States of America, by mailing a copy in a properly addressed envelope, with sufficient first-class postage prepaid, to Hon. Frank O. Evans, United States Attorney in and for the Middle District of Georgia, at his office in Room 303, United States Post Office and Courthouse Building, Macon, Georgia.

This certificate is made in compliance with the requirements of Rule 33, Revised Rules of the Supreme Court of the United States.

Wallace Miller

Wallace Miller, Jr.

APPENDIX
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 18,093

KEMP A. HARRISON
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

(July 13, 1960)
ON PETITION FOR REHEARING

Before TUTTLE, CAMERON and JONES, Circuit Judges.
PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

Section 1001, *Title* 18, *United States Code*

Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or

Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Section 1005, *Title* 18, *United States Code*

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18093

KEMP A. HARRISON,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(May 31, 1960.)

Before TUTTLE, CAMERON and JONES, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a judgment of conviction and sentence for violation of 18 U.S.C.A. Section 1001 prohibiting knowingly and willfully falsifying, concealing or covering up "by any trick, scheme, or device, a material fact" in a "matter within the jurisdiction of (a) department or agency of the United States", and of 18 U.S.C.A. Section 1005 which prohibits an officer, director, agent or employee of a federally insured bank "without authority from the directors of such bank" to make, draw, issue or put forth any bill of exchange.

In addition to the general grounds, that is, the absence of evidence on which to base a conviction, appellant complains of the court's charge to the jury, a refusal to give requested charges, the curtailing of dedendant's rights to cross examination, the admission of evidence and other subsidiary points.

The evidence produced in the trial, largely admitted by appellant, who was sworn as a witness, would fully justify the jury in finding the following facts:

On January 17, 1958 appellant was a director of the Citizens State Bank of Warner Robins, Georgia. He was also mayor of Warner Robins. He was also engaged in business as a druggist. On that day his total indebtedness to the bank amounted to $35,500.85. At that time the rules of the bank as adopted by the Board of Direcors prohibited direct indebtedness of a director to exceed $20,000. The rules of the bank also prohibited overdrafts. Appellant's indebtedness to the bank included an overdraft of $6,600.85 in the checking account of Victory Drug Company (a proprietorship owned by appellant).

On January 17, 1958 appellant agreed with one Fountain, the President of the bank, a co-defendant, who did not appeal his conviction, that appellant would give the bank a promissory note in the name of the City of Warner Robins for the sum of $20,000 and that Fountain would issue appellant the bank's Cashier's check for the net proceeds of such a loan for ninety days, in the sum of $19,700. This was done, and at Fountain's direction the entire sum was issued to discharge $19,750. of indebtedness owed by appellant and a credit of $50. was given to the Victory Drug Company checking account, representing a rebate of unearned interest on its note.

Following an investigation by the directors of the bank and other officials of the city on February 4th, appellant obtained funds sufficient to pay off the $20,000. Warner Robins note. It was undisputed that the directors of the bank had not authorized appellant to issue a Cashier's check whose proceeds were to be used to bring appellant's indebtedness to the bank into an apparent balance. It is also undisputed that the bank's

Discount Committee was required to approve "all applicaions for loan and credit" and that no such approval had been given with respect to this $20,000. loan.

The language of the statute under which appellant was convicted on Count 3 of the indictment is the general false statements statute.[1] This section makes criminal the knowing and willful falsification, concealment or covering up by any trick, scheme, or device of a material fact in any matter within the jurisdiction of any department or agency of the United States. Appellant earnestly contends that since every entry made on the books of the bank was technically correct, that is, that there was actually a note bearing the name of the City of Warner Robins (thus the entry on the Note Register to that effect was not false), that a deposit had actually been made to discharge the notes of appellant and a deposit had been made to bring the overdraft into line (and thus the bank's entries thereabout were not false), there is no false statement on which appellant could be convicted. In suport of this proposition appellant cites *Twining v. U.S.* 141 F, 41, and *Crenshaw v. U.S.* (6th Cir) 116 F. 2d 737. These cases are inapplicable to the case at bar because those prosecutions were based on a false entry statute. The Courts held that if the entries were, in fact, not false, no violation of such a statute was proved, even though the transactions thus accurately depicted were unauthorized, or even fraudulent.

Here the prosecution is not based on a false entry statute but, in Count 3, it is based on the concealment or covering up by a trick or device a material fact and, in Count 4, on the issuing of a bill of exchange without the authority of the directors.

We think it perfectly clear that the fact that the note which purported to be the legal obligation of the City of Warner Robins was not in fact

---

1 18 U.S.C.A. Section 1001 provides as follows: "Whoever, in any matter within the jurisdictoin of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

such legal obligation but was, in fact, a device for the obtaining of credit by appellant, was such a material fact as contemplated within Section 1001. When the jury found, as it was amply justified in doing, that appellant knowingly and willfully falsified, concealed or covered up this material fact, he was guilty of the offense as charged.

The next contention made by appellant attacks the conviction on Count 4, which is based on 18 U.S.C.A. 1005[2]. Again, it must be made plain that appellant was not charged under the "false entry" section of the statute. He was charged, "being an officer director, agent or employee of x x x x an insured bank" with having, "without authority from the directors of such bank", issued a bill of exchange. It is clear that the Cashier's check was a bill of exchange. *Hoss v. United States*, (8 Cir) 232 F. 328.

As has been stated above, appellant admits that he knowingly and willfully executed what purported to be a promissory note of the City of Warner Robins for the purpose of obtaining the proceeds of such note to discharge indebtedness of his own to the bank. Appellant's brief states the matter as follows:

"In a moment of weakness, and to comply with the directive of the Board of Directors, defendant Harrison went to the bank and requested defendant Fountain to lend to the City of Warner Robins, on a 90-day note, $20,000. Money had previously been loaned to the

---

[2] This section, so far as material here, provides as follows:

"Whoever, being an officer, director, agent or employee or any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or

"Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

"Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or coorporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

City by the bank on such a note, and only on the signature of the Mayor, in November of 1957, in the amount of $5,000. Defendant Fountain accepted the note of the City signed by defendant Harrison, and deducted $30(interest, and issued a cashier's check of the bank in the amount of 4,700, payable to the City, and delivered it to Harrison.

"Harrison endorsed the check and requested of the bank that the amount of the check be credited to his personal obligation to the bank, in the amount of $12,000 toward his notes, and the remainder toward his overdraft in his checking account; and this was done."

Further, appellant stated in his brief "Defendant Harrison was intending to use, improperly, he admitted, and no one will deny, the good name and credit of the City of Warner Ribins for his personal benefit until he himself could rework his loans and obtain sufficient funds to comply with the bank directors' directive of January 14."

In light of the undisputed fact that the drawing of a Cashier's check intended by the oofficial of the bank to be for the benefit of appellant was not authorized by the directors of tthe bank but was, in fact, an effort to contravene the action taken by the directors respecting both the debt limit and overdraft of a director, the jury was fully justified in finding appellant guilty of the violation of this section.

It is to be noted that the indictment charged in Court "that the issuing of the Cashier's check was done" with intent to defraud the bank and the depositors thereof. However, even a casual reading of this section makes plain that no specific intent to injure or defraud a bank is an ingredient in the offense charged in the first two paragraphs of Section 1005. Each of the first three paragraphs states a separate and distinct crime. Neither the first nor the second requires proof of any intent to injure or defraud the bank. The acts described in those two paragraphs are made criminal per se. We find very little case law on this subject. In fact, the only case found is *U.S. v. Johnson*, Ohio 187[illegible] (4 Cir.) Law Bul. 361 Fed. Cas. No. 15483. This case is cited for the proposition that an intent to injure or defraud was not necessary to com

plete the crime of drawing bills of exchange or signing notes without authority of bank directors. The statute itself seems too plain to require judicial construction. The fact that the indictment charged that the crime prohibited in the first two paragraphs was committed "with the intent to defraud said bank and the depositors thereof" does not require that proof of such intent be made in order to sustain a conviction of the crime that is complete without it. See *U.S. v. Steiner Plastics Mfg. Co.* (2d Cir.) 231 F. 2d 149; *Frazier v. U.S.* (D.C. Cir.) 163 F. 2d 817.

We think it quite clear that there was ample evidence from which the jury could find the necessary intent to defraud the bank if that had been a necessary ingredient of the crime. It would be a fraud on the bank if the bank's funds were caused to be so manipulated as to bring appellant's account into apparent compliance with the rules of the bank when, in fact, if the truth were known, the transaction producing this effect was a total sham. It is not necessary that actual damage be shown in order to constitute fraud on the bank.

The next most important point made by appellant is the Court's charge "generally, for example it is presumed that one intends the consequences of his act' and further, "and it is the law that a person intends the usual and probable consequences of his act".[4] Since as we have

---

[4] The entire paragraph in which this language is contained was as follows:

"You would not be authorized in finding the Defendants guilty of Count 4, unless you find that the Government has established beyond a reasonable doubt that the Defendants were officers and directors of the Bank insured by the FDIC and acting in that capacity, and with the intent to defraud the Bank and its depositors, did, without authority from the directors of the Bank, make and issue a bill of exchange and caused the same to be done, as alleged in the indictment.

"I have used here several times the word 'intent'. Members of the jury, intent is a material element in all of these counts charged in this indictment, and it must be proved beyond a reasonable doubt before you can convict. Intent is something, of course, that exists in a man's head, in his mind. It is impossible for you, as jurors to enter into the mind of the Defendants and to determine what they intended be done. Generally, we have some guides well established, however, to assist you in that regard. Generally, for example, it is presumed that one intends the consequences of his act. His intent has to be judged, at least, by his intelligence, as shown by the evidence; his experience in life and knowledge, as shown by the evidence; and generally by judging him as a reasonably prudent man experienced in every day affairs of life, as shown by the evidence, and as such men judge each other in their every day relationship with one another. And it is the law that a person intends the usual and probable consequences of his act."

stated above, the ingredient of specific intent to defraud is not a part of the offense charged the Trial Court actually gave the defendant the benefit of a more favorable charge than was required, since the Court charged the jury that it must mind beyond a reasonable doubt that this intent existed in order to convict. Since such finding was not necessary under the charge as defind in the statute, the Court's statement as to the presumption arising when one preforms cerain acts would be entirely harmless. The element of specific intent is not an ingredient under the offense charged in Count 3. It was, therefore, used by the Court only in connection with the crime charged under Section 1005. Actually, there is no dispute about the fact that appellant did the acts which under the first two paragraphs of Section 1005 constitute the offense of which he was convicted. It was beneficial to appellant, and therefore not error as to him that the Court further charged that "he was also entitled to an acquittal unless an intent to defraud was proved beyond a reasonable doubt", even though in defining 'intent' the Court stated, "it is presumed that one intends the consequences of his act".

We think it appropriate to say that where a specific intent to defraud is a necessary ingredient in a crime, as it would be if this indictment had been brought under the third paragraph of Section 1005, (the making of a false entry "with the intent to injure or defraud such bank"), it would be improper for the Court to charge such a presumption as that "it is presumed that one intends the consequences of his act", if the language could fairly be construed to permit the jury to find a verdict of guilt merely upon proof of a false entry with no affirmative proof of an intent to defraud. This is so because it is not true that every making of a false entry in a bank's books is done with the intent to defraud the the bank. Such an entry may, while false, be entirely innocently made. The specific intent required by the statute cannot be presumed. Here, however, the question does not arise for, as we have said, the issuing of the Cashier's check of the bank without authority of the directors is itself a crime regardless of any intent to injure or defraud the bank.

We have carefully considered the appellant's contentions that he was

prejudiced by refusal of the Trial Court to give certain requested charges. Some of these bear on the matter of intent, just discussed, and the refusal to deal with them of course, is governed by what we have already said. We find no error in the refusal to give the remaining requested charges, nor as to the other matters raised by appellant.

The judgment is AFFIRMED.